

EXIT STRATEGIES: MEDIATING TO THE HOPEFUL END

Joshua Jacks¹, Matt Schweisberg², Douglas Thompson³, and Elissa Tonkin²

end n. 1. *a limit or limiting part; a point of beginning or stopping; boundary. 2. the last part of anything; final point; finish; completion; conclusion. 3(a). a ceasing to exist; death or destruction b) the cause or manner of this ... 7. an outcome; result; upshot; consequence.*

Barn's burnt down, now I can see the moon. Mizuto Masahide (1657-1723)

A Patchwork of Perspectives

We are four mediator friends who, in life and in mediation, have seen each other through some memorable endings--and, inevitably, beginnings. As we have grown older, closer, and perhaps a little braver about confronting our own limitations, we began a deliberate conversation about endings. It has never been linear and the right words often seem to elude us, but the richness of the topic and its ceaseless relevance to our work has propelled us forward. What follows is our attempt to capture the essence of our collective musings on paper or screen, as the case may be. We invite you to join and continue the conversation, recognizing that, as with all things related to endings, we're just getting started.

Why This Topic?

Mediators often suggest to potential participants that there is little to lose and much to gain by giving the mediation process a try. While this may be a reliable pitch to engage parties, a frank look reveals a more complex set of possibilities.

Mediation endings can take a great variety of shapes and tones. At the end of a mediation, parties may achieve a thoroughly, mutually satisfying outcome. Alternatively, parties may achieve a toughly negotiated settlement, requiring compromise, sacrifice, or pain or they may arrive at a state where they feel that, though the conflict is not resolved, valuable new understandings have been achieved. The toughest endings are those where parties may not resolve

¹ Metropolitan Mediation Services, Brookline, MA

² Regional ADR Program, U.S. Environmental Protection Agency, Region 1, Boston, MA

³ The Keystone Center, Ashland, MA

their conflict and feel further rebuffed by and alienated from one another as well as the mediation process, with fresh exposures to the abrasions of conflict. The truth is that parties can leave angrier, rawer, and more exposed to the risks associated with conflict than when the process began.

One of our most talented and successful colleagues told us a story of a mediation where, at the end, one of the disputants told him, “You achieved something I didn’t think was possible... you made a bad situation worse!” Mediators can debate the reasons for bad endings. Was it because of a mediator’s failure either to exhaust all potential strategies or a failure to execute those strategies skillfully? Alternatively, did it end badly due to an unforeseeable, but inevitable flow of powerful currents of emotions, interests, personalities, politics, and other forces beyond any third party’s control?

In happier, cooperative circumstances, ending the mediation process is fairly easy, with parties and mediators enthusiastically engaged in acknowledging their accomplishments and planning the execution of their new agreement. In the more difficult circumstances, whether and how to end the process is more challenging.

When those currents are beyond our control, a mediator might be confronted with questions such as:

- How do I exit without the feeling of leaving a battlefield of wounded soldiers? How do I salvage a bad ending?
- How do I know when it is time to throw in the towel?
- When a party says (maybe repeatedly) that he or she wants out, do I continue to engage that party or graciously hold open the door?

In such circumstances, we might hope to salvage:

- A sense that the process the parties and we have endured was not a waste of time.
- A path to potential future reconciliation or agreement making, or, at least, a path protected from ongoing conflict that is full of threat and danger.
- A positive perception by the parties (and by us) of the worth of the process of mediation and of ourselves as mediators.

Any of These Situations Sound Familiar?

Mediations or other neutral assisted processes most often draw to an end in some natural fashion. Parties and the neutral agree with one another, either tacitly or explicitly, that the process is over and the conclusion—most often an

agreement of some sort or a decision not to agree—arrives more or less uneventfully. However, there are other circumstances where the ending deviates from the norm; these might include “Sports Center” endings that are memorably successful or calamitous, situations where matters are more in transition than at an end, and circumstances where it is not clear if the process is over or not. At other times, parties and neutral(s) may disagree on whether it makes more sense to continue or end a process.

Some basic categories of endings include:

Happy Endings. Everyone’s favorite. These endings are characterized by parties finding themselves to be in a better place than before the process started. The engagement has produced an agreement, improved understanding, a narrowing of the issues in contention or some other measure of improvement. The sentiment may be joyous, bittersweet or a mixture of emotions but the parties generally feel better off by some measure for going through the process.

Bad Endings. Just as Tolstoy said every unhappy family is unhappy in its own way, so it can be with mediations. Bad endings will leave the parties feeling the process was of little value or, worse, detrimental to them. They leave feeling more frustrated, more estranged from one another and perhaps assuming positions more antagonistic and polarized than at the outset. Some bad endings are spectacular with parties storming away from a negotiation, eager to describe what a terrible mediator they had to endure. Others may end with quiet despair, with no ill-feelings expressed but the parties feeling that no progress occurred. Even worse, some bad endings result in a broadening of the dispute (e.g., additional issues of contention, demands for greater compensation).

Extra Innings. In some situations, mediators and parties may experience faux endings. An agreement might be reached and signed but the parties find there are more issues for discussion. Perhaps a monetary claim is settled with a signed agreement but parties continue a discussion about some aspect of their past or prospective relationship. What appears to be an end to the mediation actually proves to create the conditions for another, often more meaningful conversation.

Passages. The mediator may pack his or her briefcase, shake hands and leave but the work may continue for the parties. The parties may feel they have reached a point where neutral assistance is no longer needed (or the value added is no longer worth the cost). The neutral assisted phase of the negotiation ends but the negotiation continues in some fashion. The mediator may remain “on call” in case things become difficult or complicated.

Pause Button. Sometimes in order to save face, comply with an authority not at the table or for some other reason, parties feel a need to bring a process to a close even though there may be potential gains by continuing. The language used by either the parties or the mediator (“at this juncture” or “suspending discussions” or “it may make sense to reconvene once this new report is available”) explicitly or implicitly suggests a hiatus rather than a fully closed door. In other cases, parties may be reacting primarily from anger or frustration or fatigue and the mediator can “end” the process in a manner that could nevertheless allow an opportunity for graceful reengagement. Sometimes breakdown must precede breakthrough.

In other circumstances, the question is less one of what the ending looks like but an even more basic question--whether or not to draw things to a close.

Parties Disagree with Each Other. By dint of temperament, strength of BATNA and other factors, parties often differ on the usefulness of continuing a neutral assisted process. Some might be conflict junkies who love the toxic intimacy; others prize efficiency or dislike protracted discussion and wish to withdraw. How should the neutral approach a situation where some parties want a process brought to an end and others see value in continuing?

Neutral(s) and Parties Disagree. Sometimes parties agree that the process should end (or in some cases never begin) yet the neutral senses potential benefits in continuing. How does the neutral balance party autonomy against the knowledge that parties’ feelings of hopelessness during a mediation may be a poor predictor of outcome? In the opposite circumstance parties wish to continue but the mediator believes it is time to bring things to a close. A group may fall in love with itself and find it difficult to end. Or parties communicating well may nevertheless develop separation anxiety when they contemplate moving ahead without mediator assistance. In some cases, party stamina for conflict and impasse may exceed that of the mediator.

Neutrals Disagree with Each Other. Neutrals themselves may have different proclivities and tolerances for ending vs. continuing a process. What “diagnostics” should they look at to determine whether pressing on or finding a graceful exit would be in the better interest of the parties? How do you avoid giving up too soon/too easily versus how to avoid holding people in a process that is no longer serving their interests sufficiently?

Implications for Practice

When things seem to be getting messier rather than headed for a tidy, comfortable close, when that light ahead is more likely an oncoming train than the other end of the tunnel, what is a mediator to do? What thoughts might mediators have rolling around in their minds when considering whether and

how to influence the end of a process? Here are ten questions mediators may want to consider and which just might help stave off the nightmare ending.

1. *Are you the only one who needs more closure? (It's a mediation, not a hostage situation.)*

Sometimes, without fanfare, parties are clear that they're done and ready to go home. This happens regardless of whether they loved or hated the process or outcome. They've just reached their limit and their hearts and minds are out the door. Be open to the signs of this. Resist the impulse to drag them through a ritualized closing process to satisfy your notion of a good ending. Wrap things up, mercifully and quickly, before parties start to feel as if they're in mediation jail. You can always linger and do the closure thing with any remaining parties who feel the need. But beware of tacitly encouraging impatient parties to leave too early. Sometimes their haste is not in their best interest and, if you can hold them a bit longer to be certain the substance is concluded, they and the others will be grateful that you did.

2. *What does it mean when a party threatens to or actually storms out? (Anticipating the calamity)*

Probably not, "Gee, this sure is a fabulous process!" But it could mean any number of things. Perhaps something was said that the party found terribly upsetting. Perhaps the party wants to intimidate others in the room. Perhaps the party wants attention. Perhaps, but not necessarily, the party is signaling the end of the process. In volatile situations, where parties might seem inclined to use stormy departures as a form of expression, it may be possible to negotiate a deal up front that will benefit the process. Recognizing that parties may choose to leave at any point, ask them in advance if they will agree to talk with you (in confidence) before walking out. "If you're beginning to feel like this isn't working for you, like you want to leave, please ask for a break and let's talk." The purpose is not to talk them out of their decision but to understand what is on their mind and to see if there is a way to address their needs in the process. Apart from the value of such conversations should they ever occur, legitimizing and reinforcing a party's right to leave may take the wind out of a potentially disruptive departure.

3. *Are these parties capable of procrastinating until the end of time? (Have a plane to catch)*

When you are dealing with parties who will fill whatever time they think is available and will only get serious five minutes before the end, establish a non-negotiable ending time.

4. *Is this a nap or a funeral? (Calling it a nap might make it one)*

If you can't tell whether an impasse, breakdown or other type of pause in the process is final, help the parties characterize it as a hiatus rather than an ending. If the time comes when they are ready to resume discussions, this will allow them to come back to the table without losing face. This will give them license to be in contact with you so that you can help them figure out whether and when to come back—without any party visibly taking the first step.

5. *Have you reached the point where your greatest contribution to the parties' progress would be to leave? (Too much of a good thing)*

The goal here is to give the parties no more and no less than what they need. The “no more” part is often harder than the “no less” part, especially when you are being paid by the hour. Don't shrink from a clear-eyed look at whether the parties are now in a position to do for themselves what they once needed your assistance with. Helping the parties realize that they don't need you any more may be bad business but it's great mediating—and in the end it's probably good business as well.

6. *Did anyone besides you notice how much was accomplished? (Offer a humble catalogue)*

Some of the biggest achievements of a process are invisible to the parties immersed in it. Identify and draw attention to the less obvious benefits and accomplishments but do so with humility. Don't presume the value that parties' attach to particular outcomes; take care in characterizing achievements, erring on the side of understatement, lest you be perceived (perhaps accurately) as touting your own mediative tour de force oblivious to how the parties experienced matters. Don't make a mole hill out of an ant hill, but be sure the ants know that they've made a hill.

7. *Did the process unfold in such an unexpected way that no one knows what the ending is supposed to look like? (Shifts happens)*

This is a corollary to questions 5 and 6 above. Sometimes the mediation carries the parties to a new place that renders their initial goals irrelevant. Perhaps a greater level of understanding has created more tolerance for conflicting perspectives and what was once a burning issue no longer seems urgent though it remains unresolved. Whatever the particulars, a once unbearable constellation of circumstances has shifted. In these cases, there may be no obvious endpoint. Rather there are any number of points at which you can help the parties take stock of where they are, bring their process to a close, and return their somewhat transformed situation to the unmediated world where it will continue to unfold.

8. *Is it party time? (Love fest or vanishing act—only the parties know for sure)*

At the successful conclusion of a long, arduous process, help the parties explore whether and how to celebrate their ending together. In a multi-party case, it is rare that everyone is both privately and publicly pleased enough with the outcome to pop the champagne cork together (one party's triumph is often another party's embarrassment). But what a kick when it happens. Be careful not to force the issue and recognize that the parties may need a breather between resolution and celebration (even if they don't recognize it, you may need to help them do so). They also might need you, the neutral, to toss the idea out to them, to help them sort out the pros and cons, and, if the pros prevail, to help them design an event that is true to their collaborative success.

9. *What are the parties reading into their inability to reach agreement?*
(Addressing the "what does this say about me" question)

When a process concludes without a resolution, parties might feel a profound sense of failure--not only did they find themselves in a dispute for which they sought mediation (for some, a sign of failure in itself), but worse yet, they couldn't even succeed with a mediator's help. "What's *wrong* with me?" they may be asking themselves. You can provide a more positive—and arguably, more accurate--response to this unspoken, self-flagellating question than the one they are likely to give themselves. Your alternative response might include: acknowledging that it's a really hard situation; commending them for their courage in giving mediation a try despite the magnitude of the challenge; applauding their hard work and creativity during the process; and pointing out that, whatever happens going forward, they now have the satisfaction of knowing that they made an earnest attempt to resolve it and found no easy answer around the corner to meet them. Sincerity here is a plus (avoid referring to note-cards when making this speech).

10. *Is a happy ending too good to be true? (Dare to burst the bubble)*

When parties get swept up in the momentum of a resolution that appears to be coming together quickly, their longing for a swift and happy ending can cause lapses in judgment and attention to detail. They are prone to gloss over terms that they don't understand, overlook important implementation questions or not realize that different assumptions are at work. Are the parties rushing into a collaborative embrace that might be too good to be true? You are now face to face with perhaps the most challenging obstacle to impartiality that mediators must overcome--the intoxicating allure of an agreement—for it is hard to play mediator as killjoy. How far should you go to question whether the parties have considered all the angles? The answer, of course, is that it depends on countless questions of context. A guiding principle might be that you should go as far as you need to go to satisfy yourself that the parties know what they're doing. This encompasses the possibility that the parties are making an informed choice to forge ahead without regard to all of the details or potential

problems. They may have good reasons for not worrying, but whether they do or not, you have done your job by probing it. By the same token, if a deal falls apart as a result of your testing the parties' grasp of its implications, you have also done your job. In that case, a happy ending may have eluded the parties and you may become the repository for their disappointment. Those are the tough days when you need a mediator friend to buy you an ice cream cone and remind you that you did the right thing.

Concluding Transition

Perhaps it is trite to suggest that every ending is a beginning, but it seems undeniable that, short of Armageddon, every ending is a transition to something else. Sometimes those transitions cry out for a guide (and sometimes they don't). Despite the practical suggestions we offer above, our conversation about endings has led us to no definitive answers. But it has helped us to clarify the question we have been chasing, a question that we will continue to ask ourselves: When and how can a mediator help to assure that the ending of a process is a transition to something that allows parties safety, dignity, and hope?

Note: Submitted in connection with the panel discussion "Exit Strategies: When and How to End a Process Well," ECR 2008 Conference, Tucson, Arizona, May 2008. The views expressed in this piece are solely those of the authors and do not necessarily reflect the official position of the agency or organizations with which they are affiliated.